

## **Wills and Estates Planning**

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This document was prepared after the Esk'etemc Community Engagement Sessions, at the request of Esk'etemc members and the Esk'etemc Kukpi7 and Council. The purpose of this document is to provide a summary of the information shared by Esk'etemc's Specific Claims legal counsel, Stan Ashcroft.

### **Two Key Principles regarding Wills**

1. You can't dictate from the grave. This means that you can't demand in your Will that your beneficiaries use part of your estate to do something. For example, you can't say "I require that my daughter Joan pay \$10,000 out of the money that I have left to her to be spent on buying lottery tickets". You can make requests, but not demands. Alternatively, you can set up a trust with specific conditions for the release of funds.
2. You cannot give what you don't have. For example, I have seen many instances where people purport to leave the house they are living in on reserve to a relative, friend or other person, even though the house is actually owned by the First Nation.

### **Dying On and Off Reserve**

1. If a person with status dies on reserve, the process of approving a Will or appointing an Administrator if there is no Will, is handled by the estates section of Indigenous Services Canada.
2. If a person with status dies off reserve and they don't have a Will, their estate is governed by the Estate Administration Act of British Columbia. What this means is that in order for an Administrator to be appointed, an application has to be made to the Supreme Court of British Columbia, which can be costly and time-consuming.

### **The Importance of having a Will and Probate Fees**

1. If there is no Will, applications have to be made to Indigenous Services Canada if that status individual died on reserve, or the Supreme Court of British Columbia if they died off reserve, for the appointment of an Administrator to handle the estate matters.
2. If there is a Will and a person or persons have been appointed to act as the executor (male) or executrix (female) or trustee of the estate, the process with Indigenous Services Canada in the case where the individual died on reserve, is much simpler and reasonably quick, and there is no need to apply to the Supreme Court of British Columbia for an Administrator to be appointed when the person died off reserve.
3. When there is no Will, the appointment of an Administrator can be contentious and often results in strife within families.
4. Given the foregoing, it is strongly recommended that members of Esk'etemc have a Will.
5. If the status person dies off reserve, and their estate exceeds a value of \$25,000, the Will must be probated. The probate fees are \$6 per thousand, for estates valued from \$25,001 to \$80,000, and 1.4% on amounts over \$80,000. There is also a \$200 Court application fee. As such, it is recommended that houses off reserve, bank accounts, and other assets be in joint names, as then title to the house or the bank accounts go directly to the joint owner and do not form part of the estate and do not result in probate fees being payable. Similarly, pension plans should have a named beneficiary so that funds that are payable go directly to the beneficiary.

### **Important Provisions in a Will**

1. The most important provision in a Will is the naming of an executor/executrix or trustee. It is strongly recommended that there be an alternate executor/executrix/trustee named, as the original appointee may not wish to, or be unable to, act in that capacity by the time of your demise. It is also very important to inform the person(s) who you are appointing and obtain their consent. As well, I have seen many problems arise when there are joint executors/executrices/trustees appointed, as they often disagree on issues regarding the disposition of your estate's assets, resulting in the resolution of your estate being put in limbo or unnecessary costs being incurred, or both.
2. You must set out the powers and duties of your executor/executrix/trustee. An example of that is attached.
3. If you have minor children when you die, and your spouse has either also died, or dies within 30 days of your demise, or is unwilling to care for the children, you should appoint a guardian or guardians to take care of them. The care for their maintenance can come out of monies set aside by you in your Will that can be held by the guardian(s), some other person(s) or in a trust. You can state in your Will that one or more of your children will not inherit part of your estate until they reach a certain age, such as 25 years old, but you should explain why.
4. If there are particular items that you wish to leave to certain people, that should be set out in your Will. As well, if you wish to leave monies to a charity, or other organization, you need to specify that in your Will.
5. You may wish to allow your executor/executrix/trustee to seek professional advice with the fees for those professionals being paid out of the estate.
6. You should include clauses whereby the executor/executrix/trustee will not incur any liability, and be indemnified for their actions regarding your estate, provided they act in good faith.
7. It is important to include what you wish to have happen to your remains after you die – cremation or burial, and where your remains are to be placed. While your executor/executrix/trustee is not bound by your wishes, it makes it a lot easier on them and your family to know your desires.
8. You must indicate in your Will that you revoke all prior Wills and codicils (amendments or additions to your Will).
9. If you are specifically leaving less, or nothing, to your spouse or one or more of your children, you should explain why, in order to hopefully avoid a legal challenge to your Will.

### **Preparation and Witnessing of your Will**

1. Your Will does not need to be prepared by, or witnessed by, a lawyer, notary public or commissioner for taking oaths. You can prepare it yourself.
2. In order for your Will to be legally valid, it needs to be dated and signed by you before two witnesses, who should not be your executor/executrix/trustee(s) or their alternates, nor beneficiaries under your Will, as they may be deemed to be in a conflict of interest. The witness lines should set out their names (signed and printed), their address and occupation.

### **Registration of your Will**

1. It is strongly recommended that you register a Wills Notice with the B.C. Vital Statistics Agency which has a Wills Registry. This creates a record of the fact that you have a Will and where it is located.

### **Example of Powers and Duties of Executor/Executrix/Trustee**

I give my Trustee all my property and Articles of every kind, and wherever located, to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate, as set out in paragraph 8 of this Will, and the authority:

- (a) to pay out of my estate:
    - (i) my debts, including income or other taxes payable up to and including the date of my death;
    - (ii) my funeral and other expenses related to this Will and my death; and
    - (iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing upon my death, that property to include:
      - A. insurance proceeds on my life payable as a consequence of my death (but excluding the proceeds of insurance upon my life owned by any corporation or owned by any partnership of which I am a partner);
      - B. any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;
      - C. any gift made by me in my lifetime; and,
      - D. any benefit arising by survivorship;
- My Trustee may pay these taxes and duties whether they are imposed by the law of this jurisdiction or any other, and my Trustee may prepay or delay payment of any taxes or duties;
- (iv) any tax payable under the Property Transfer Tax Act or other legislation as a result of any transfer from my estate.

### **Powers of Trustee**

#### **Convert or Keep**

When my Trustee administers my estate:

- (a) my Trustee may convert my estate, or any part of my estate, into money, and decide how, when, and on what terms; and,
- (b) my Trustee may keep my estate, or any part of it, in the form it is in at my death, and for as long as my Trustee decides, even for the duration of the trusts in this Will. This power applies even if:
  - (i) the property is not an investment authorized under this Will;
  - (ii) a debt is owing on the property; or,
  - (iii) the property does not produce income.

#### **Allocate Assets of My Estate**

When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate to allocate to any share or interest in my estate, and the value of each of those assets. Whatever value my Trustee places on those assets will be final, and binding, on everyone interested in my estate.

**Valuation**

When my Trustee values any asset of my estate, my Trustee must take into account its fair market value and adjusted cost base.

**Investments**

When holding, keeping or investing, my Trustee may invest in any investments authorized by the *Trustee Act* of British Columbia for the investment of trust funds.

**Deal with Business**

If my estate holds any interest in any business, incorporated or otherwise, my Trustee may deal with that interest, and may exercise any rights, powers, and privileges in connection with that interest, to the same extent as I could if I were alive and the only owner of that interest. I ask that my Trustee wind up my business affairs, as expeditiously as possible, in accordance with the provisions of the *Trustee Act* in order to ensure that my beneficiaries receive the maximum benefit from my estate.

For example, Jane Doe may carry on that business, for as long as my Trustee decides is in the best interests of my estate. Jane Doe will not be liable for any loss suffered or expenses incurred in carrying on that business. Jane Doe's powers include:

- (a) using any of the capital of my estate that is invested in that business at my death to carry on that business;
- (b) adding capital from my estate, with or without taking security, to carry on that business;
- (c) withdrawing capital of my estate from that business;
- (d) when the term of any partnership expires, renewing it for any determined period or otherwise;
- (e) varying all, or any, of the terms contained in any partnership agreement;
- (f) introducing any person, or persons, as partner or partners in that business;
- (g) dividing the profits, or paying any sum in lieu of, profits to any partner;
- (h) hiring or employing in that business any persons, including any Trustee, at a salary or remuneration as Jane Doe decides is reasonable in that business;
- (i) terminating the employment of any person in that business;
- (j) extending or curtailing any activities of that business;
- (k) adopting any new line of activity for that business;
- (l) forming, or join in forming, a company to take over or purchase the whole, or any part, of that business;
- (m) selling that business to any company, at whatever price and on whatever terms, my Trustee decides;
- (n) reorganizing or reconstructing any company;
- (o) winding up any company;
- (p) incorporating any company;
- (q) surrendering or exchanging an interest in any company for other shares in that company, or any other company;
- (r) entering into, or varying the terms of, any shareholder's agreement;
- (s) in general, dealing with all shares and securities of that business in any way; and,
- (t) lending, with or without security, any money or other asset from my estate to any company in which Jane Doe may own the majority of the voting shares.

**Further Powers Dealing with Prosperity**

My Trustee, with respect to any property (personal or real) forming part of my estate, may exercise any rights, powers, and privileges in connection with that property, to the same extent as I could if I were alive, and the only owner of that property. Those powers include:

- (a) managing any of that property;
- (b) spending money out of capital and income, or either, to repair, convert, improve, or rebuild any of that property;
- (c) razing any building on that property;
- (d) erecting any building on that property;
- (e) insuring any of that property against whatever risks, and in whatever amounts, my Trustee decides;
- (f) renting, leasing, or permitting the use or occupancy of any of that property, for any period of time, and on whatever terms that my Trustee decides;
- (g) terminating or accepting the surrender of any lease or rental arrangement concerning that property;
- (h) granting any option or right of first refusal to any person to purchase or lease that property, for any period of time, and on whatever terms my Trustee decides;
- (i) paying off or renewing any mortgages on that property;
- (j) paying any person in any profession, trade, or business to transact any business or trade, or to do any act in relation to that property;
- (k) transferring that property in exchange for other property, on whatever terms and conditions my Trustee decides;
- (l) making and repairing roads, fences, and drains on that property;
- (m) granting or releasing easements and rights of way on that property; and,
- (n) subdividing that property, signing subdivision plans, and if any part of the property is required for public roads or access, dedicating or conveying that part of it to the Crown or any municipality or similar competent authority.

**Power to Compromise or Review**

My Trustee may, at any time:

- (a) compromise, settle, or waive any claim due to, or due by, my estate for whatever consideration, and on whatever terms, my Trustee decides; and,
- (b) extend, continue, or renew any evidence of any liability I may have as endorser, guarantor, surety, or otherwise for any liability of any person.

**Power to Purchase**

My Trustee may, at any time, rent, lease, purchase, or otherwise acquire an interest in real property, for the use or occupancy of, any beneficiary of my Will, that use or occupancy to be on whatever terms that my Trustee decides.

**Loans to Beneficiaries**

My Trustee may lend any money, or other asset from my estate, to any beneficiary, on whatever terms and taking whatever security, if any, my Trustee decides.